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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 602

DAMPSKIBSSELSKABET DANNEBROG, a corporation, Claimant of the Motorship "STJERNEBORG", and AKTIESELSKABET BORGESTAD, a corporation, Claimant of the Motorship "BRAND",

Petitioners,

vs.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a corporation,

Respondent.

PETITION

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and

BRIEF IN SUPPORT THEREOF

LANE SUMMERS,
Proctor for Petitioners,
Central Building,
Seattle, Washington.

W. H. HAYDEN,
F. T. MERRELL,
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THE COURT PRESS

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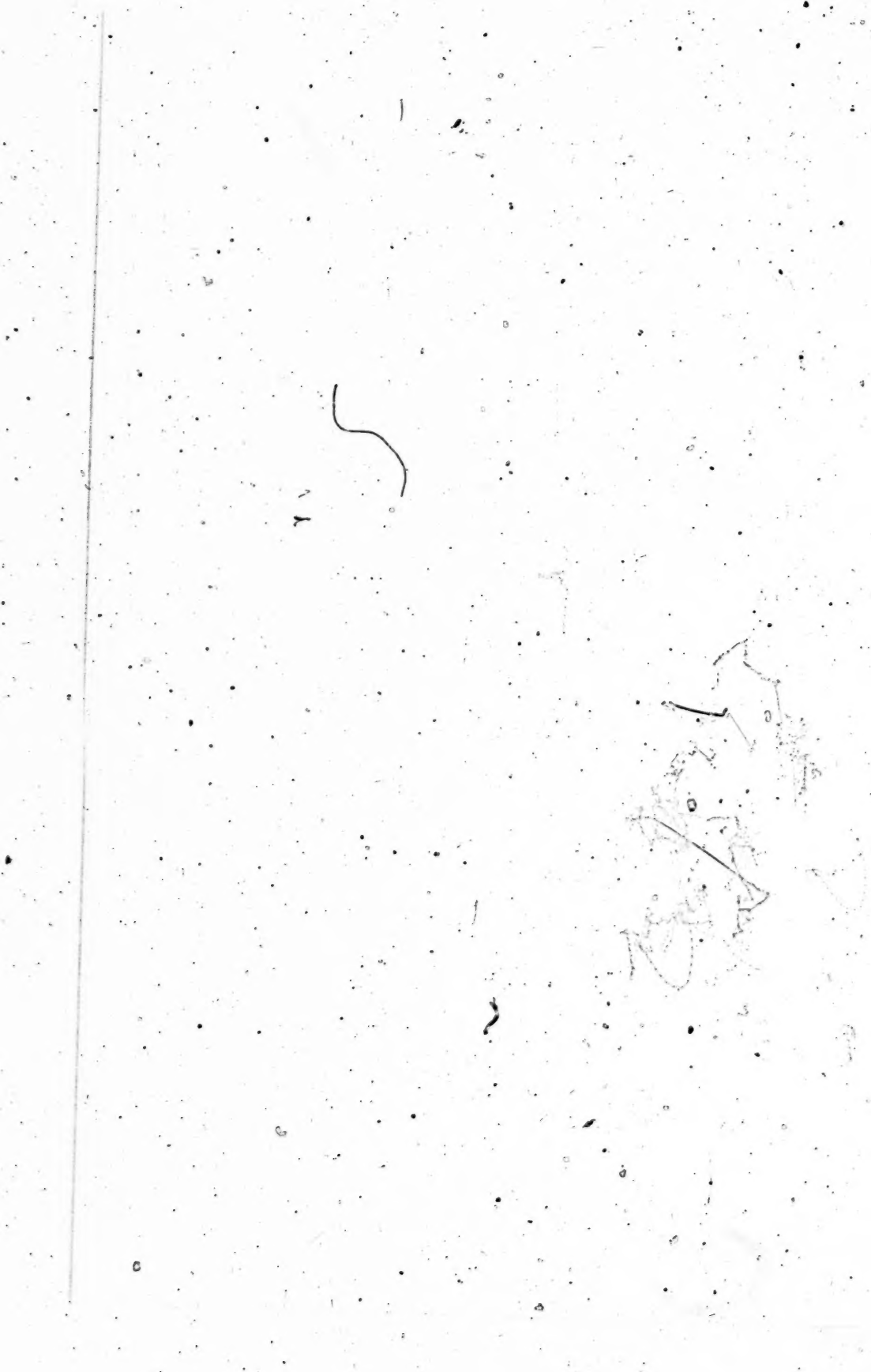

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TO THE HONORABLE CHARLES E. HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PRAYER

The petitioners, DAMPSKIBSSELSKABET DANNEBROG, a corporation, and AKTIESELSKABET BORGESTAD, a corporation, pray that a writ of certiorari be issued to review the decree entered October 26, 1939, by the

United States Circuit Court of Appeals for the Ninth Circuit in the above entitled consolidated cause (R. 228).

DECREE BELOW

Such decree of the United States Circuit Court of Appeals for the Ninth Circuit affirmed decrees of the District Court of the United States for the Western District of Washington, Southern Division, in favor of respondent Signal Oil and Gas Company of California, a corporation, granting judgment and foreclosing a maritime lien against the motorship "Stjerneborg", owned by the petitioner Dampskibsselskabet Dannebrog, a corporation, and against the motorship "Brand", owned by the petitioner Aktieselskabet Borgestad (R. 228, 170-174).

QUESTION PRESENTED

Whether, under the maritime lien provisions of section 30 of the Merchant Marine Act of June 5, 1920 (46 U. S. Code, 971-975) a maritime lien exists against a vessel in favor of a supplier of fuel oil ordered solely by a buyer, who was itself obligated by the vessel's charter party to "provide and pay for all" fuel oil, when such supplier, before the execution of said charter party, had previously become legally bound by contract to sell to such buyer on its personal credit all fuel oil required for "any and all vessels owned, chartered and or operated" subsequently by the buyer.

SUMMARY OF FACTS

In September, 1932, the respondent Signal Oil and Gas Company, as seller, entered into a formal blanket long-term contract (Ex. A; R. 45-53) with Anglo

Canadian Shipping Co. Ltd., as buyer, for the future sale and purchase of fuel oil for all vessels "which the buyer may own, charter, operate or be agents for" (R. 31).

In May, 1933, said contract was modified by letters to permit W. L. Comyn & Sons, a corporation, as buyer, to purchase fuel oil for "any and all vessels owned, chartered, and/or operated" by it. Under said contract as modified the respondent Signal Oil and Gas Company became obligated to sell, and W. L. Comyn & Sons became entitled to buy upon its own order and upon its own credit (R. 32, 33, 58, 59, 60, 61, 62).

Said contract, as originally executed and as thereafter modified, used no language which stated or implied that the respondent in obligating itself to future sales and deliveries of fuel oil was relying on the credit of any vessel or upon a maritime lien (R. 45-53, 58-62); and said contract, as the respondent's exclusive protection against non-payment for past credit deliveries, provided that the respondent as to further deliveries might require the buyer to pay cash or might suspend deliveries pending full payment, or might terminate the contract (R. 49).

Both before and after said contract was modified to constitute W. L. Comyn & Sons as a buyer thereunder, the respondent either actually knew, or easily could have ascertained, that W. L. Comyn & Sons was in business not as a vessel owner, but merely as an operator of vessels, sometimes for owner's account and sometimes for charterer's account (R. 41).

Later, W. L. Comyn & Sons became the charterer of the motorship "Stjerneborg" in January, 1934, and of the motorship "Brand" in March, 1934 (R. 114, 126). Both charter parties obligated the

charterer to "provide and pay for all" fuel oil (R. 40, 116; 128).

Subsequently, under said contract as modified, the respondent filled two orders by W. L. Comyn & Sons for delivery to the "Brand" of fuel oil upon April 26, 1934, and upon May 11, 1934 (R. 37, 38); and also, under said contract as modified, the respondent filled another order by W. L. Comyn & Sons for delivery to the "Stjerneborg" of fuel oil upon May 15, 1934 (R. 38, 39). Such orders were made solely by W. L. Comyn & Sons, which was related to said vessels only as charterer under said charter parties (R. 39, 40).

W. L. Comyn & Sons, due to its insolvency, never made payment to respondent for fuel oil so furnished (R. 41).

As a result, respondent asserted a maritime lien against the "Stjerneborg" by libel in rem filed May 11, 1935, and against the "Brand" by similar libel filed June 5, 1935, (R. 4-10). The vessels after seizure upon process were duly released on bonds by the petitioners as owners thereof (R. 10-19).

By their answers the petitioners appropriately denied the allegations of said libels, and affirmatively alleged in defense that no maritime lien existed (1) because under all the terms of said contract the fuel oil was supplied upon the sole credit of W. L. Comyn & Sons, and not upon the credit of the vessels, and, (2) because under said charter party W. L. Comyn & Sons was obligated to "provide and pay for all" fuel oil, and hence was without authority to pledge the credit of the vessels (R. 21, 22, 27, 28).

Because of the similarity of facts involved and the identity of questions presented, the two causes were consolidated for trial and later for appeal (R. 31, 207).

RULINGS OF LOWER COURTS

On the trial the facts were submitted by stipulation in lieu of evidence (R. 31-153).

In the District Court as to the two questions tendered for review here, the memorandum decision merely said: "The stipulated facts show that the oil was furnished upon the credit of the vessels and that, in consequence, the asserted liens were created" (R. 157).

The appellate court, after reciting briefly the contentions of petitioners that a maritime lien did not exist because the fuel oil contract disclosed respondent's intention not to rely upon the credit of the vessels but to rely solely upon the credit of W. L. Comyn & Sons, and because the charter party failed to confer upon W. L. Comyn & Sons authority to pledge the credit of the vessels, ruled to the contrary (R. 225, 226). The Circuit Court of Appeals considered that the case of the *President Arthur*, 279 U. S. 564, was not applicable, and concluded that its own former decisions in *The Portland*, 273 Fed. 401, and in *The Golden Gate*, 52 Fed. (2d) 397, were controlling (R. 225, 226).

Both the lower court and the higher court seem to commingle and confuse petitioner's contentions—one as to credit arising out of the contract; the other as to authority arising out of the charter party.

REASONS FOR GRANTING WRIT

1. Conflict of Decisions Between Circuit Courts of Appeals

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in conflict with the

decisions of the Circuit Court of Appeals for the Fifth Circuit in *The Cratheus*, 263 Fed. 693 (Cert. denied, 253 U. S. 492); and in *Pensacola S. Co.* v. *U. S. Shipping Board*, 277 Fed. 889.

In *The Cratheus, supra* (pp. 693, 694), the supplier "was under written contract with the charterers to furnish 'all the bunker coal required by them * * * for steamers of which they are owners, charterers, or time charterers, or in which they are otherwise interested'"; and the charter party required the charterers "to provide and pay for all coal" and "contained nothing on the subject of the charterers creating or discharging liens on the vessel". On consideration of these facts the Circuit Court of Appeals for the Fifth Circuit held that no maritime lien arose in favor of the supplier and affirmed the lower court in a dismissal of the libel asserting such a lien.

This conflict of decision has been conceded by the Circuit Court of Appeals for the Ninth Circuit. In the present cause it cited its own former decisions in *The Portland*, 273 Fed. 401, and in *The Golden Gate*, 52 Fed. (2d) 397, as controlling (R. 226); and stated that the question was re-examined upon its own later decision in *The Luddeo*, 66 Fed. (2d) 997, wherein its opinion (p. 998) recites the conflict with *The Cratheus*, 263 Fed. 693 (C. C. A. 5) and with the *Pensacola S. Co.* v. *U. S. Shipping Board*, 277 Fed. 889 (C. C. A. 5).

2. Conflict with Applicable Decision of this Court

The decision of the Circuit Court of Appeals for the Ninth Circuit in this cause is probably in conflict

with the applicable decision of this court in *Piedmont, etc. Coal Co.* v. *Seaboard Fisheries*, 254 U. S. 1.

In that case (254 U. S. 9) this court categorically classified the elements of a maritime lien by saying:

> "*Because the ship's need was the source of the maritime lien, it could arise only (1) if the repairs or supplies were necessary; (2) if the pledge of her credit was necessary to the obtaining of them; (3) if they were actually obtained; and (4) if they were furnished upon her credit.*" (Numerals supplied.)

In the present cause two of these essentials to a maritime lien were absent. First, the respondent under its contract sold the fuel oil to W. L. Comyn & Sons upon its individual credit solely. Hence, such fuel oil was not furnished upon the credit of the vessels. Second, by such contract the respondent was legally bound to sell fuel oil to W. L. Comyn & Sons for "any and all vessels owned, chartered and/or operated" by it—wholly irrespective of its authority or lack of authority by subsequent undetermined charter party or operating agreement to pledge the credit of such vessels. Hence, it was not necessary that the credit of the vessels be pledged for such vessels to obtain fuel oil from respondent.

3. Question Justifies Settlement by this Court

Important provisions of respondent's blanket sales contract with W. L. Comyn & Sons are in common usage by distributors of oils to vessels for fuel purposes. The most vital and the most usual provision of said contract, which obligated respondent to sell fuel oil to W. L. Comyn & Sons for "any and all

vessels owned, chartered and/or operated" by it, has been considered in maritime lien cases in identical language or meaning by inferior Federal Courts with varying results.

The Cratheus, 263 Fed. 693 (C. C. A. 5);
The Portland, 273 Fed. 401 (C. C. A. 9);
The Golden Gate, 52 Fed. (2d) 397 (C. C. A. 9);
The Dictator, 18 Fed. (2d) 131 (D. C., La.).

As to the form of the charter parties involved in this cause, it is the "Time Charter Government Form, approved by the New York Produce Exchange" (R. 114, 126), which is of such frequent adoption as to be quoted in many texts and publications for resort of both lawyers and laymen interested in shipping.

3 Benedict Admiralty (5th ed.) p. 88;
Poor on Charter Parties (2nd ed.) p. 223;
Cases on Admiralty, Lord & Sprague (2nd ed.) p. 967;
8 Nichols Cyclopedia of Legal Forms, p. 439.

The essential provision of the charter party form which obligated W. L. Conyn & Co. to "provide and pay for all" fuel oil, has been so long a factor in maritime relationships as to receive, with differing results, interpretation by a number of admiralty opinions.

The Cratheus, 263 Fed. 693 (C. C. A. 5);
The Augusta W. Snow, 46 Fed. (2d) 992 (C. C. A. 1);
The J. W. Hennessey, 57 Fed. (2d) 77 (C. C. A. 2);
The Golden Gate, 52 Fed. (2d) 397 (C. C. A. 9);

The Everosa, 93 Fed. (2d) 732 (C. C. A. 1);
The Millinocket, 266 Fed. 392 (D. C., N. Y.);
The Thordis, 290 Fed. 255 (D. C., N. Y.);
The A. S. Sherman, 51 Fed. (2d) 782 (D. C., N. Y.);
The Pajala, 7 Fed. Supp. 618 (D. C., N. Y.);
The Henry W. Breyer, 17 Fed. (2d) 423 (D. C., Md.);
The U. S. 219, 21 Fed. Supp. 463 (D. C., Penn.);
The City of Helena, 25 Fed. Supp. 864 (D. C., Mo.).

However, no maritime lien decision of this court has placed final construction on the controlling clause in either the contract or the charter party. Hence the question decided by the appellate court as to the existence of a maritime lien in this cause, both as affected by respondent's blanket oil contract and as affected by W. L. Comyn & Sons' charter party, justifies consideration and settlement by this court as a matter of broad concern in water commerce.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

LANE, SUMMERS,
Proctor for Petitioners.

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United States of America,
District of Columbia,
City of Washington. } ss.

Lane Summers, being first duly sworn, on oath deposes and says:

That he is an attorney at law, admitted to practice before the Supreme Court of the United States; that he is one of the proctors for said petitioners; that he prepared the foregoing petition in good faith and not for delay; that said petition in his opinion is meritorious and well founded in law.

LANE SUMMERS.

Subscribed and sworn to before me this 19th day of January, 1940.

EDNA W. SCHALLER

Notary Public in and for the District of Columbia.

(Seal)